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No. 08-305

IN THE
Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,
Petitioner,
v.
T.A.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE OF THE DISABILITY RIGHTS LEGAL CENTER, LEARNING RIGHTS LAW CENTER, PUBLIC COUNSEL, CHILDREN AND ADULTS WITH ATTENTION DEFICIT/ HYPERACTIVITY DISORDER, AND CALIFORNIA ASSOCIATION FOR PARENT-CHILD ADVOCACY IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI[1]

Amicus Curiae Disability Rights Legal Center (DRLC) is a non-profit organization devoted to promoting the rights of people with disabilities, as well as public interest in and awareness of those rights, by providing legal and related services. The DRLC accomplishes this mission through a number of programs, including the Civil Rights Litigation Program, the Cancer Legal Resource Center (a joint program with Loyola Law School), the Education Advocacy Program, the Options Counseling program, the Lawyer Referral Service, the Inland Empire Program, and the Community Outreach Program. The DRLC has handled disability rights cases since 1975, including numerous special education cases under both federal and California law.

The mission of the non-profit Learning Rights Law Center (LRLC) is to ensure that students have equitable access to the public education system. LRLC focuses its efforts on students with learning disabilities or difficulties; students involved or at risk of becoming involved in the child welfare and/or juvenile justice systems; and students not accessing the public school system because of disability, homelessness, and other

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[1] As indicated on the Court's on-line docket, the parties granted consent to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

factors. LRLC advocates for justice in education through a variety of initiatives including its civil rights litigation program.

Public Counsel is the public interest law office of the Los Angeles County and Beverly Hills Bar Associations and the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. Public Counsel's Children's Rights Project provides education rights representation and advocacy for the most vulnerable children in Los Angeles, including children with special needs, foster youth, and homeless children. Because these children already face innumerable obstacles to receiving a free and appropriate public education and their families lack the resources to ensure that they are receiving the education benefits guaranteed under law, Public Counsel has a direct interest in ensuring that the Individuals with Disabilities in Education Act (IDEA)[2] is not violated and that the specific protections provided by IDEA are accurately

[2] 20 U.S.C. § 1400 *et seq.* This law has evolved over time since its original enactment as the Education for all Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The current version of the law was enacted as part of the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Pub. L. No. 108-446, 118 Stat. 2647. IDEA constitutes Title I of IDEIA, and the provisions at issue in this case are part of IDEA.

implemented and fully enforced.

CHADD (Children and Adults with Attention-Deficit/Hyperactivity Disorder) is committed to improving the lives of individuals with AD/HD and represents individuals of all ages with AD/HD, their families, and the professionals who work with them. CHADD was founded by parents in 1987 in response to the frustration and sense of isolation experienced by parents and their children. CHADD is the leading national non-profit organization for children and adults with AD/HD, providing the public and providers with education, advocacy, and support. CHADD has 12,000 members, and networks every week with over 70,000 individuals, mostly families of children and adults with AD/HD. About 1,200 CHADD members are professionals providing clinical, research, and other services to persons with AD/HD. CHADD has over 200 chapters and almost 300 "Parent to Parent" certified teachers throughout the country. In addition, CHADD produces the bi-monthly *Attention* magazine, and sponsors an annual conference. The National Resource Center on AD/HD (NRC) is the national clearinghouse for evidence-based information about AD/HD funded by the Centers for Disease Control and Prevention (CDC).

CAPCA (California Association for Parent-Child Advocacy) is an all-volunteer organization of parents, advocates, professionals, and attorneys that monitors policy and sponsors legislation affecting the education and life-long prospects of children, adolescents, and young adults with disabilities. Since 2003, CAPCA has

provided information and advocacy to the California legislature regarding special education issues, helping to prevent adverse changes in state law and policy and acting to expand special education rights. Many of the students for whom CAPCA and its members advocate have families who cannot afford or otherwise access private special education services, and for such students, CAPCA is deeply concerned about potential reduction of the already minimal accountability of districts for identifying and meeting disability-related educational needs. Because of CAPCA's work and its members' actions on behalf of families and students, CAPCA has a direct interest in ensuring that IDEA is not violated, that educational supports are available on a timely basis, and that the specific protections provided by IDEA are accurately implemented and fully enforced.

This case is of interest and concern to *amici* DRLC, LRLC, Public Counsel, CHADD, and CAPCA because the children with disabilities and their families whom these amici serve in the area of educational rights will experience significant adverse effects unless this Court affirms the Ninth Circuit's interpretation of IDEA. Adopting a contrary interpretation would allow and even incentivize school districts to neglect their "Child Find" obligations under IDEA, because the districts could avoid their duty to fund private education for children with disabilities that cannot be addressed by the district's own programs, simply by failing to identify those children as having qualifying disabilities.

Such an interpretation of IDEA would have a disproportionate impact on lower income families by forcing parents of children with disabilities whom their districts never identify to shoulder the costly burden of independent evaluation and education of their children, a burden that Congress clearly intended the States to bear. Even if the parents of such children manage to overcome the obstacles to obtaining accurate evaluations of their children's disabilities and finding appropriate private educational settings, the districts never would be obligated to pay for the "free appropriate public education" of those children because the district never recognized them or refused to recognize them. Therefore, it never provided these children with any special education services. Congress plainly did not intend IDEA to contain such a loophole for children with disabilities who cannot be served appropriately in their local public schools.

The Ninth Circuit's decision implements the fundamental purposes and express mandates of IDEA as enacted by Congress and recognized by the courts. DRLC, LRLC, Public Counsel, CHADD, and CAPCA write to provide material background and perspective on the reasons why this Court should affirm that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

Free public education through high school for all children has been an essential component of the American promise for nearly 100 years. Congress enacted IDEA, our nation's special

education law, to protect the rights of students with disabilities by requiring that all students, including those with disabilities, receive "free appropriate public education" (FAPE). This right is particularly important to low-income families, who cannot afford independent assessments, private education or other support services if a public school fails to provide them. IDEA not only mandates equal access for students with disabilities eligible for special education and related services,[3] but also imposes upon States and their local school districts the affirmative duty to identify those children and ensure that they receive educational services appropriate to their needs. 20 U.S.C. § 1412(a)(3)(A). Not all disabilities are obvious, and those that impede learning may not be easily recognized.

This case is about a student's right to have a timely and comprehensive eligibility assesment in all areas of suspected disability provided by the school at no expense to the parents. The school's failure to assess the student's needs accurately and timely, and the concomitant lack of special education instruction and related services, lead to devastating consequences for the student and society. Courts have recognized that students who do not timely receive all of the special education and related services they need are

[3] 20 U.S.C. § 1401(29) ("'[S]pecial education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability . . ."); 20 U.S.C. § 1401(26) (defining "related services").

irreparably harmed.[4] Consequently, absent timely and comprehensive assessments and subsequent provision of services, many children ultimately need more services than they would have required if served properly initially.

This case also raises serious implications for children of low-income parents, who have few, and often no, resources to pay for private educational services when the public school fails to identify and provide for the educational needs of their children. Additionally, these families do not have the means to pay an attorney to advocate the rights of their children when schools fail or refuse to carry out their IDEA obligations. If the Ninth Circuit's decision is not upheld, the number of children who would be adversely affected is significant, as 28% of families of children with disabilities live below the poverty line.[5]

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[4] *Howell v. District of Columbia*, 522 F. Supp. 2d 57, 64 (D.D.C. 2007) (*quoting Cox v. Brown*, 498 F. Supp. 823, 829 (D.D.C. 1980)) ("Students suffer irreparable harm when they 'lack [] each day of their young lives an appropriate education, one that is sensitive to their particular disabilities, commensurate to their levels of understanding, and fulfilling their immediate needs.'"); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138, 143 (W.D.N.Y. 1999) ("The denial of a FAPE over an extended period of time does constitute harm and the longer that denial continues, the more irreparable it becomes").

[5] Jiyeon Park, Ann P. Turnbull, & H. Rutherford Turnbull III, *Impacts of Poverty on Quality of Life in Families of Children with Disabilities*, 68 Exceptional Children 150, 152 (2002) ("Twenty-eight percent of children with disabilities, ages 3-21,

The school district's actions in this case also highlight another problem for some children with disabilities and their parents, which would be exacerbated by adopting petitioner's interpretation of the law. One apparent reason why Forest Grove School District refused to recognize that T.A. needed special education was that—like many teens who struggle in school due to learning disabilities (LD) or other health impairments (OHI)—T.A. used marijuana to relieve his depression. However, numerous studies have shown that drug use often is the effect, rather than the cause, of disabilities that adversely affect learning.

We do not allow drug addiction or dependence to prevent people from receiving medical treatment for depression or other conditions that may accompany substance abuse—indeed, beneficiaries of government healthcare programs can receive treatment for both at public expense.[6] If school districts were allowed to use the accompanying symptom of drug use as an excuse to stigmatize some children with disabilities, and refuse to recognize those students as having disabilities and entitlement to FAPE, our society as a whole would suffer—because those students never would receive the education and skills they need to become productive citizens.

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are living in families whose total income is less than the income threshold set by the U.S. census bureau").

[6] *See* 42 U.S.C. §§ 1395x(b)(3) and (ff); *Medicare National Coverage Determinations Manual*, Pub. 100--3, Ch. 1, §§ 130.1 to 130.7; 42 U.S.C. §§ 1396d(a)(13); 42 C.F.R. § 440.130(d).

The Ninth Circuit correctly held that under some circumstances, school districts may be required to pay for private education of students with disabilities for whom the districts failed to provide an IEP and a FAPE because they failed to recognize the students as having qualifying disabilities. This Court should affirm.[7]

ARGUMENT

I. School Districts Must And Can Implement Effective "Child Find" Policies; The Law Should Not Encourage Them To Shirk This Essential Duty.

Congress explicitly imposed on States and local school districts the duty of developing and implementing effective procedures to identify children with disabilities and then provide them with appropriate services. The Ninth Circuit properly rejected the argument that if a district fails to identify a child as having a disability qualifying him or her for special education services, then the district is forever off the hook financially, because it can never be required to fund private education for a student to whom it

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[7] DRLC, LRLC, Public Counsel, CHADD, and CAPCA express no opinion about the appropriateness or merits of T.A.'s particular educational placement. Rather, these *amici* support the Ninth Circuit's holding that sometimes a school district may be obliged to pay for a child's private special education even though the district had not previously provided special education services to that child—where the child never received such services from the district due to district's own failure to fulfill its IDEA obligations (not just the parents' unilateral choice).

never provided public special education services. That is not and should not be the law, because it undermines the affirmative duty of school districts and other local education agencies to find and assess students with disabilities to determine their eligibility for such services, and actually incentivizes districts not to identify students with disabilities (despite their parents' entreaties), particularly in the most difficult cases—where the district could not meet the students' needs itself, so only private education would be "appropriate."

A. Congress Imposed An Affirmative Duty Upon States And Local School Districts To Identify Students With Disabilities.

Federal money the States receive to fund education comes with conditions: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a). Thus, no State or local district can deny a child with a disability eligible for special education the benefits of a free education. This obligation toward children with learning disabilities also is codified under IDEA. 20 U.S.C. § 1412(a)(1).

One of IDEA's most important provisions is the Child Find mandate, which requires States to develop and implement practical methods of determining which children with disabilities are receiving special education and related services

and which children are not receiving the services they need. 20 U.S.C. § 1412(a)(3). This mandate applies to all children residing within a State, including those attending both private and public schools,[8] highly mobile children, migrant children, homeless children, and wards of the state. *Id.* The comprehensive Child Find mandate also applies to children like T.A. who receive passing grades and are "advancing from grade to grade." 34 C.F.R. § 300.111(c)(1). This provision recognizes that a child with a disability who appears to be "getting by" nevertheless may not be receiving an appropriate education.

In some instances parents may be entitled to reimbursement for private education even where they did not request that their local public school district identify and evaluate their child. For example, in *Doe v. Metropolitan Nashville Public Schools*, the Sixth Circuit reversed the district court's dismissal of the parents' claim alleging Child Find violations, and remanded the case for trial, holding that summary judgment was not appropriate. 133 F.3d 384 (1998), *cert. denied*, 525 U.S. 813 (1998). The district court held that because Doe's parents had unilaterally placed him

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[8] 20 U.S.C. § 1412(a)(10)(A)(ii)(II) (2006); *see also* 20 U.S.C. § 1412(a)(10)(A)(i) (2006) (requiring school districts to devote funding to private school children with disabilities in the amount of federal IDEA Part B funds proportionate to the number of children enrolled in private schools within the district); 20 U.S.C. § 1412 (a)(10)(A)(iii) (2006) (imposing the requirement that local education agencies consult representatives of private schools and parents of privately placed children during the design and development of services for children with disabilities).

in private school without providing the school district an opportunity to evaluate or create an IEP for him, the district was not obligated to reimburse them. *Id.* at 385. The Sixth Circuit reversed and remanded, holding that summary judgment was inappropriate because genuine issues of material fact remained, including the extent of the parents' knowledge that they could obtain services from the school district and the degree of the district's laxity in its Child Find efforts. *Id.* at 387. The appellate court stated that where the parents claimed "the lack of dialogue stems from the school district's failure to conduct sufficient 'child find,' reimbursement may be appropriate." *Id.* at 387-88.

Other judicial decisions similarly have resulted in tuition awards based on Child Find violations. For example, in *New Paltz Cent. Sch. Dist. v. St. Pierre*, the court awarded tuition reimbursement for a child who was not evaluated after the parent informed the superintendent of the child's emotional difficulties and a school psychologist recommended placement. 307 F. Supp. 2d 394, 402 (N.D.N.Y. 2004). In *Dep't of Educ. v. Cari Rae S.*, the court found the state responsible for the cost of hospitalization for failure to refer and evaluate a student earlier. 158 F. Supp. 2d 1190, 1200 (D. Haw. 2001).[9]

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[9] *Cf. Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 823 (M.D. Ga. 1997) ("in order to establish that the school violated the identification requirements of IDEA, Plaintiff must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or

Here, the district essentially conducted half an evaluation, stopping after it determined T.A. did not have a learning disability, and completely ignoring the possibility of another health impairment such as AD/HD. Pet. App. 3a, n.1.[10]

B. Additional Funding Is Available To Help Provide Services To Children With Qualifying Disabilities, So Districts Should Not Be Encouraged To Evade This Duty In Hard Cases.

While not all services required under IDEA are funded by it, once children are identified as having disabilities, there are other funding sources for certain services. For example, to assist the States in this regard, Congress allows them to use Medicaid funds to finance health services delivered to special education students enrolled in Medicaid.[11] The IDEA defines "related services" to include medical services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related

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that there was no rational justification for not deciding to evaluate").

[10] Thus, if the district's failure to meet its Child Find obligations were at issue here (which *amici* recognize it is not), this case would meet even the apparently stricter standard articulated in *Clay T.*

[11] Cong. Res. Service (CRS) Report for Congress, *Individuals with Disabilities Education Act (IDEA) and Medicaid* (January 31, 2003); available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7575:1 (last visited Mar. 14, 2009).

services (34 C.F.R. § 300.34(c)(5)) and health services provided by another qualified person such as a school nurse or physical therapist, to enable a child with a disability to receive a FAPE (34 C.F.R. § 300.34(c)(13)). Notably, "[t]he financial responsibility of . . . the State Medicaid agency and other public insurers of children with disabilities[] must precede the financial responsibility of the [school district] (or the State agency responsible for developing the child's IEP)" with regard to a disabled child enrolled in both IDEA and Medicaid, when necessary services are covered by the state's Medicaid program. 34 C.F.R. § 300.154(a)(1).

Medicaid covers a number of services relevant to IDEA such as wheelchairs, ventilators, and prosthetic devices. Medicaid also covers therapy services for children with orthopedic impairments and speech disorders, as well as vision-related screening, diagnostic services, and eyeglasses. Children who have hearing disorders may receive audiology services and hearing aides. In some cases, non-medical supportive services such as psychosocial rehabilitation and assistance with daily activities provided by a professional attendant may be covered. Finally, Medicaid may cover psychologist and social worker services, prescribed drugs, and transportation.[12]

[12] See CRS Report, *supra* note 11.

II. Congress's Express Intent Is To Ensure A FAPE For Every Eligible Child Through IDEA.

A. IDEA's Legislative History Shows Congress Never Meant To Allow The Families Of Some Children With Qualifying Disabilities To Be Left To Their Own Devices.

IDEA's legislative history points to four main reasons for its enactment:[13] (1) increased awareness of the needs of children with disabilities; (2) judicial decisions recognizing a constitutional requirement to educate children with disabilities; (3) inability of States and local agencies to fund the cost of educating these children themselves; and (4) a belief that educating children with disabilities would help them to become productive members of society and lessen the burden on taxpayers.

What is now IDEA originally was enacted in

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[13] Cong. Res. Service (CRS) Report for Congress, *The Individuals with Disabilities Education Act: Congressional Intent* (May 19, 1995); available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7997:1 (last visited Feb. 27, 2009). Materials examined for this report included the House and Senate Reports, the House and Senate Conference Reports, and the House and Senate debates. H. Rep. No. 332, 94th Cong., 1st Sess. (1975); S. Rep. No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425; H. Conf. Rep. No. 664, 94th Cong., 1st Sess. (1975); S. Conf. Rep. No. 455, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1480 (1975); 121 Cong. Rec. 19482 *et seq.* (1975); 121 Cong. Rec. 23710 *et seq.* (1975); and 121 Cong. Rec. 25534 *et seq.*

1975 as P.L. 94-142, the Education of All Handicapped Children Act (1975). The legislative history of P.L. 94-142 demonstrates congressional awareness of the need to educate children with disabilities. For example, both the House and Senate Reports note that statistics provided by the Bureau for the Education of the Handicapped in the then Department of Health, Education and Welfare indicated that only 3.9 million of the more than 8 million children with disabilities in the U.S. were receiving an appropriate education, with 1.75 million such children receiving no educational services at all.[14]

Additionally, the legislative history of P.L. 94-142 indicates the law was at least in part a response to several court decisions, notably *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) (*PARC)*, and *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972). For example, the Senate report stated that the legislation as originally introduced "followed a series of landmark cases establishing in law the right to education for all handicapped children."[15]

PARC was a class action suit brought by a state association and parents of certain children with mental disabilities. The suit claimed the state statutes excluding these children from

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[14] H. Rep. No. 332, 94th Cong., 1st Sess. 11 (1975); *see also* S. Rep. 168, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1432.

[15] S. Rep. No. 168, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1430.

public school education were unconstitutional. It was settled when the parties joined in a consent decree stating (in part) that each of these children must have access to a free public program of education and training appropriate to his or her capacity and, if possible, receive instruction in a class with children who are not disabled. Although the *PARC* court was not required to decide the constitutional issues, it nevertheless noted that it "was satisfied that the plaintiffs have established a colorable [equal protection] constitutional claim . . . ." *Id.* at 283 n.8. This language provided support for later cases, including *Mills*.

Mills was brought on behalf of seven children excluded from the District of Columbia's public schools after being labeled as behavioral problems, mentally retarded, emotionally disturbed, or hyperactive. These children had received no hearings or review of the decisions to exclude them. *Mills* at 868. The *Mills* court held it was a denial of constitutional due process to suspend or expel a child without a prior hearing. *Id.* at 874.

The House Report noted that after the *PARC* and *Mills* cases, "there have been 46 cases which are completed or still pending in 28 States."[16] These decisions were described as "a nationwide movement in both State and Federal courts to establish that all handicapped children have a constitutional right to a public education."[17] The

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[16] H. Rep. No. 332, 94th Cong., 1st Sess. (1975).

[17] *Id.* at 10.

legislative history of P.L. 94-142 also indicates that parents should not be forced to rely upon time-consuming judicial action to obtain public education for their children with disabilities. The Senate report specifically stated:

> It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal requiring all children to be in school. S. 6 takes positive necessary steps to ensure that the rights of children and their families are protected.[18]

Further impetus for the enactment of P.L. 94-142 was the inability of States and localities to fund education for children with disabilities on their own. The Senate Report observed that States had attempted to comply with the judicial decisions mandating a right to education, but that

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[18] S. Rep. No. 168, 9th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1433. This language was echoed in the Senate debate during a discussion by Senator Williams, the chairman of the Committee considering the legislation. "It is time that Congress took strong and forceful action. It is time for Congress to assure equal protection of the laws and to provide to all handicapped children their right to education." 121 Cong. Rec. 19485 (1975) (remarks of Sen. Williams).

"lack of financial resources have [sic] prevented the implementation of the various decisions which have been rendered."[19]

Practical rationales also supported the enactment of P.L. 94-142. Following a discussion of the statistics showing the number of children with disabilities who were not receiving an appropriate education, the Senate Report discussed the practical implications of these facts:

> The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.[20]

The Senate Report also notes that providing educational services would help to decrease the number of persons in institutions. "One need only look at public institutions to find thousands of persons whose families are no longer able to care

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[19] S. Rep.No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1431.

[20] S. Rep. No. 168, 94th Cong., 1st Sess. (1975), reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1433.

for them and who themselves have received no educational services. Billions of dollars are expended each year to maintain persons in these subhuman conditions."[21]

Congress meant to improve the lives and prospects of children with qualifying disabilities by ensuring that the government provides free appropriate education to all of them. Parents may choose to fund private education themselves, but they should not be forced into that option because the district failed to identify a disability requiring special education instruction and related services.

B. Any Money Saved By Delaying Identification And Provision Of Special Education To Affected Children Will Be Spent Later—Many Times Over—To Deal With Homelessness And Poverty, And To Fund The Law Enforcement, Criminal Justice, And Penal Systems.

IDEA compels States to identify and provide services to children with qualifying disabilities. While the expense of this duty may burden state budgets, failing to educate these children creates an even greater financial burden, as all too often children with untreated disabilities become teenagers and adults ill-equipped to cope with the stresses of modern society. Crime, poverty, and homelessness are a common result.

For example, the professional literature in the

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[21] *Id.*

area of correctional education states that the number of students with disabilities eligible for special education in adult correctional facilities throughout the United States ranges from 30-50%.[22] The number of youth with disabilities eligible for special education in juvenile detention is estimated to be up to 70%.[23] One study found that 17-53% of juvenile delinquents have learning disabilities, and 19-46% of delinquents are diagnosed with AD/HD, in comparison to 2-10% of the general child population.[24] Consistent with these findings, the number of students age 6 to 21 receiving special education in juvenile corrections is almost four times higher than in public school

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[22] C.M. Fink, *Special Education in the Service for Correctional Education*, 41 J. Correctional Educ. 186 (1991) (in adult correctional facilities 30-50% of inmates need special education); Nicholas Freudenberg, *Coming Home from Jail: A Review of Health and Social Problems Facing US Jail Populations and of Opportunities for Reentry Interventions*, available at http://urban.org/reentryroundtable/inmate_challegens.pdf (last visited Mar. 27, 2009); Dignity in Schools Campaign, *The Right to Education in the Juvenile and Criminal Justice Systems in the United States: Submission to Vernor Munoz Special Rapporteur on the Right to Education Human Rights Council, United Nations* (Dec. 31, 2008), available at http://www.dignityinschools. org/news-and-events#46 (last visited Mar. 26, 2009) ("People in state prison have significant educational needs . . . 40% had a disabling condition that interfered with learning").

[23] Peter E. Leone, *et al.*, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. Rev. 389, 389 (1995) (studies estimate the prevalence rate of disabling conditions among incarcerated juveniles is up to 70%).

[24] Marty Beyer, *Fifty Delinquents in Juvenile and Adult Court*, 76 Am. J. Orthopsychiatry 206, 208 (2006).

programs.[25] "The prevalence of [learning disorders] among the juvenile justice population has led some professionals to characterize juvenile justice as a 'default system' for youth who can't read or write well, who have mental health problems, and who drop out or are forced out of school."[26]

The prevalence of learning disabilities and AD/HD among homeless children and adults is also significantly higher than in the overall population. Six to 31% of homeless youth have AD/HD.[27] One study found that 45% of homeless children living in shelters merited a special education evaluation, yet only 23% had received special education testing and services.[28] Another study of sheltered homeless youth age 16 to 21 found that 52% had a reading disability and 28.5% had an arithmetic disability.[29] That study concluded, "Given the high prevalence of learning difficulties in our sample, it is possible that

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[25] Mary Magee Quinn, *et al.*, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 Exceptional Children 339, 342 (2005).

[26] *Id.* at 340 (citations omitted).

[27] Lara E. Embry, *Risk Factors for Homelessness in Adolescents Released from Psychiatric Residential Treatment*, 39 J. Am. Acad. Child Adolesc. Psychiatry 1293 (2000).

[28] Bonnie T. Zima, *et al.*, *Sheltered Homeless Children: Eligibility and Unmet Need for Special Education Evaluations*, 87 Am. J. Public Health 236, 240 (1998).

[29] Melanie A. Barwick & Linda S. Siegal, *Learning Difficulties in Adolescent Clients of a Shelter for Runaway and Homeless Street Youths*, 6 J. Research on Adolescence 649, 649 (1996).

learning difficulties and underlying processing deficits placed certain individuals at risk and may even have contributed to the dysfunctional experiences that precipitated their homelessness."[30]

III. AD/HD Affects Substantial Numbers of School Children.

AD/HD is a common neurobiological condition affecting 5-8% of school-age children.[31] AD/HD is characterized by developmentally inappropriate levels of inattention, impulsivity, and hyperactivity.[32] A 2005 CDC report found that parents reported approximately 7.8% of school-age children (4 to 17 years) had a history of AD/HD diagnosis and that about half of these (4.3%) were treated with medication.[33] Other studies show that more than 70% of children with AD/HD will continue to experience symptoms of AD/HD into adolescence, and almost 65% will

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[30] *Id.* at 664.

[31] CHADD, *The Disorder Named AD/HD (WWK1)*, available at http://www.help4adhd.org/en/about/what/WWK1 (last visited Mar. 30, 2009); *cf.* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM IV* 90 (4th ed. 2000) (DSM IV) (estimating 3-7% at that time).

[32] *Id.* at 85.

[33] U.S. Centers for Disease Control and Prevention, *Mental Health in the United States: Prevalence of Diagnosis and Medication Treatment for Attention-Deficit/Hyperactivity Disorder—United States, 2003* (2005), available at: http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5434a2.htm.

exhibit AD/HD characteristics as adults.[34] In addition, as many as two-thirds of children with AD/HD have at least one co-existing condition.[35] According to U.S. Department of Health and Human Services data regarding diagnosed AD/HD and LD, between 2004 and 2006 approximately 8.6% of children between 6 and 17 years of age had either LD alone or LD combined with AD/HD.[36]

A number of national organizations recognize AD/HD as a condition that can significantly impair an individual's functioning at work, at school, or in society.[37]

The American Psychiatric Association's DSM IV provides the criteria used by doctors, mental

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[34] Stephen V. Faraone, Joseph Biederman, & Eric Mick, *The Age-Dependent Decline of Attention-Deficit Hyperactivity Disorder: A Meta-Analysis of Follow-Up Studies*, 36 Psych Med 159 (2005); Ronald C. Kessler, *et al.*, *The Prevalence and Correlates of Adult ADHD in the United States: Results from the National Comorbidity Survey Replication*, 163 Am. J. Psychiatry 724 (2006).

[35] American Academy of Child and Adolescent Psychiatry, *Practice Parameters for the Assessment and Treatment of Children, Adolescents, and Adults with Attention-Deficit/Hyperactivity Disorder*, 36 J. Am. Acad. Child Adolesc. Psychiatry 894, 895 (2007).

[36] *Diagnosed Attention Deficit Disorder and Learning Disability: United States, 2004-2006*; Vital and Health Statistics, Series 10, No. 237, July 2008.

[37] These organizations include: The American Medical Association, the Surgeon General of the United States, the National Institutes of Health, the CDC, the American Academy of Pediatrics, and the American Academy of Child and Adolescent Psychiatry.

health professionals, and other qualified clinicians when making a diagnosis of AD/HD. The diagnostic criterion for AD/HD states that the essential feature of AD/HD is a "persistent pattern of inattention and/or hyperactivity—impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development."[38] In addition, the behaviors must create significant difficulty in at least two areas of life, such as home, social settings, school, or work, and be present for a minimum of six months.[39]

If untreated or inadequately treated, AD/HD can have serious consequences, increasing an individual's risk for school failure, unemployment, interpersonal difficulties, other mental health disorders, substance and alcohol abuse, injury, antisocial and illegal behavior, contact with law enforcement, and shortened life expectancy.[40] Appropriate identification, services, and treatment can help individuals with AD/HD avoid negative outcomes and lead successful lives.

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[38] DSM IV, *supra* note 31, at 85.

[39] *Id.* at 86.

[40] Russell A. Barkley, Attention-*Deficit Hyperactivity Disorder: A Handbook for Diagnosis and Treatment* 165, 265-75 (2006).

IV. Petitioner's Construction Of IDEA Would Disproportionately And Unfairly Impact Lower-Income Families; Low-Income Parents Face Tremendous Difficulties In Trying To Contest School District Decisions To Withhold Special Education Services.

Petitioner's interpretation of IDEA not only would incentivize school districts to evade their Child Find duties in the most difficult cases, but also would thereby increase the burdens on families, by shifting this responsibility from the States to the parents of children with disabilities. That would place the responsibility on those who are least equipped to handle it, as children growing up in lower income families are more likely to have disabilities.

Recent studies have found that there is a direct correlation between disability and poverty, and that children living in poverty are much more likely to have a disability than those children living in affluence.[41] These studies also have shown that the number of children living in poverty who have disabilities has dramatically increased in the last decade.[42] Almost 20% of children with disabilities live in households with

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[41] Regina L. Enwefa, Stephen C. Enwefa & Robert Jennings, *Special Education: Examining the Impact of Poverty on Quality of Life of Families of Children with Disabilities*, Forum on Public Policy 3 (2006), available at https://secure.oldhamcounty.com/forumonpublicpolicy/archive06/enwefa.pdf (last visited Mar. 28, 2009).

[42] *Id.* at 2.

annual incomes of less than $15,000.[43] In contrast, only 12.5% of households in the general population fall below this income level.[44] A student with a disability is 50% more likely to live in poverty than a student without a disability. *Id.* Thus, the tremendous challenges facing the parents of children with disabilities often are compounded by financial constraints. For example, a key component of many school districts' Child Find process is the assessment, in which a child is evaluated to determine eligibility for special education services. If parents disagree with the school district's assessment, the parents may request an independent evaluation of the child at the district's expense, but the district can choose to defend its assessment in an administrative hearing—a daunting prospect both psychologically and financially for low-income parents. Moreover, if the administrative law judge (ALJ) concludes in the hearing that the district's assessment was appropriate, the parents can obtain an independent assessment only at their own expense. 34 C.F.R. § 300.502(b)(3).

Whenever there is disagreement with the school district regarding identification, evaluation, reevaluation, classification, educational placement, provision of a FAPE, or disciplinary action, the parents of a student

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[43] Park, *supra* note 5, at 152.

[44] The Special Education Elementary Longitudinal Study funded by the Office of Special Education Programs (OSEP) in the U.S. Department of Education. Data available at: http://old.nichcy.org/pubs/research/rb2txt.htm (last visited Mar. 17, 2009).

between the ages of 3 and 21 can request a due process hearing conducted by an ALJ.

In California, for example, the Office of Administrative Hearings (OAH) administers IDEA's procedural safeguards.[45] OAH provides an ALJ who hears evidence presented both by the parents and by the school district at the due process hearing.

In spite of these procedural protections, a parent cannot easily challenge a district when it fails to identify a child, denies special education eligibility, or denies the child FAPE. In addition, for low-income families, there are even greater obstacles, such as language barriers, financial constraints, literacy issues, disability and greater fear of retaliation.

For example, parents attempting to navigate the dispute resolution process in California receive a 62-page OAH manual (*id.*), which currently is available only in English. This obviously places non-English speakers and those for whom English is a second language at a distinct disadvantage, because they may not understand the 62-page document that attempts to explain the hearing process. The manual also is not accessible to some parents with disabilities, particularly those with cognitive disabilities. *See* Disability Rights Law Center's Comments to

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[45] *A Parents Guide: Understanding the Special Education Hearing Process at the Office of Administrative Hearings*, Second Draft, available at http://www.documents.dgs.ca.gov/oah/SE/SE%20PARENT%20MANUAL%20Second%20Draft%20To%20Website%200122109.pdf

OAH's Draft Parent Manual, December 1, 2008, at 2.[46] Similarly, the actual hearing process as set forth in the manual also is not accessible to some parents with disabilities. For example, a hearing may be too far away for the parents to attend, or too lengthy in light of a parent's physical or mental disabilities, or it may fail to provide a sign language interpreter for a deaf parent. *Id.* at 1-2.

Attorney representation is not required at the hearing, but many, if not most, parents may be too intimidated or confused to face the process without the assistance of counsel. This is particularly true because school districts regularly are represented by counsel in these proceedings, even where the parent is proceeding *pro se*.[47] Many parents, particularly those who have limited or no financial resources, are unable to retain counsel to represent them. Although some legal services organizations provide free representation to low-income families in special education cases, these resources are very limited and thus, cannot fulfill the very high demand for such representation.[48]

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[46] Available at: http://www.disabilityrightslegalcenter.org/about/educationadvocacy.cfm.

[47] *See e.g.*, California Special Education Division Quarterly Report, Fourth Quarter 2007/2008 Fiscal Year, http://www.documents.dgs.ca.gov/oah/forms/2008/2007-08%20Fourth%20Quarter%20Report.pdf (27.8% of California IDEA cases in one quarter were filed by parents without counsel).

[48] Nancy Lee Jones & Ann Lordman, *The Individuals with Disabilities Act: Final Part B Regulations*, Cong. Res. Service 3 (Dec. 11, 2008) (citing Perry A. Zirkel, *Lay Advocates and*

To further exacerbate the problem, as a result of new IDEA regulations effective in December of 2008, parents now may not be represented in a due process hearing by an advocate who is not an attorney unless such representation is specifically allowed for by State law.[49] A 2006 study found that only 12 States affirmatively allowed for the use of non-attorney advocates.[50]

Further, if parents want an expert to provide support (such as explaining why the assessment results indicate the child is eligible for special education services), the parents are responsible for shouldering that expense too, as such costs are not reimbursable to a parent who successfully challenges a school district in a due process hearing. *Arlington v. Murphy*, 548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 5266 (2006). This is often an impossible barrier for a family with little or no financial resources. This problem is further compounded by the fact that (as discussed more fully below) a parent who challenges the district's denial has the burden of proof and thus, expert testimony is likely to be crucial to the success of the parent at a due process hearing.

Low-income parents of children with

Parent Experts under the IDEA, 217 Ed. Law. Rep. 19 (May 3, 2007) (noting the shortage of available attorneys to represent parents at due process hearings)).

[49] 34 C.F.R. § 300.512(a)(1), 73 FED. REG. 73017 (Dec. 1, 2008); Nancy Lee Jones & Ann Lordeman, *The Individuals with Disabilities Act: Final Part B Regulations*, Cong. Res. Service 3-4 (Dec. 11, 2008).

[50] *Id.* at 3 (citing Zirkel, *supra* note 48).

disabilities also lack an option that more affluent parents may choose when facing a similar situation. While parents in more comfortable financial circumstances can transfer their child to a private school while the dispute resolution process plays out, parents of limited means are forced to sit by while their child languishes in a public school that refuses to recognize and provide educational services that are appropriate to the child's disability.

Parents of children with disabilities face procedural as well as fiscal obstacles. In *Schaffer v. Weast*, this Court held that the burden of proof in an administrative proceeding lies with the party seeking relief. 546 U.S. 49, 57-58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). This burden may be shifted by operation of state law (*id.* at 57), but unless it is, the parents of the child with a disability must prove that their child is deserving of special education services if their child's assessment has resulted in denial of such services. For low-income parents especially, this adds to the already onerous burden on their shoulders.

Parents also may experience psychological difficulties with contesting a decision that their child does not deserve special education. Not only is such an administrative hearing likely to be a daunting experience, particularly for people unaccustomed to dealing with bureaucracies, but it requires the parents to insist that their child has special needs. Understandably, few parents want to admit that their child has a disability. This makes the school district's role in identifying

students with disabilities even more critical.

According to a Roper Starch poll conducted in 2000, 44% of parents who noticed their child exhibiting signs of difficulty with learning waited a year or more before acknowledging their child might have a serious problem.[51] Whether due to cultural factors, lack of understanding, or simple denial, parents do not effectively identify children who require special education services. Petitioner's interpretation of IDEA would transfer significant identification responsibility to parents by incentivizing school districts to not identify students whose disabilities might require private education. Thus, that interpretation is counter-productive and harmful, and will result in fewer children with disabilities receiving special education services. This result would undermine the intent of Congress and the goal of educating our country's special needs children.

V. Children With Disabilities Would Be Harmed By Creating A Substantial Disincentive For School Districts To Find Them Promptly And Identify, Assess, And Provide Services For Their Disabilities Under IDEA.

By delaying identification of children with disabilities, school districts can avoid or delay the costs of developing IEPs and providing special education for many children, and also can delay or avoid altogether paying reimbursement for

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[51] Roper Starch Worldwide, *Measuring Progress in Public and Parental Understanding of Learning Disabilities* (2000).

private placement of those who cannot be served appropriately in the public schools.

As the Ninth Circuit noted below, a categorical bar against reimbursement for private school expenses to students who have not yet received special education is nonsensical:

> [it] would lead to the *absurd result* that the parents of a child with a disability must wait (*an indefinite, perhaps lengthy period*) until the child has received special education in public school before sending the child to an appropriate private school, no matter how uncooperative the school district and no matter how inappropriate the special education.

Pet. App. 15a (emphasis added).

Experts agree that early identification and intervention is critically important in helping students with disabilities achieve academic success. "Without early intervention, the poor first-grade reader almost invariably becomes a poor middle school reader, high school reader, and adult reader. In short, children who get off to a poor start in reading rarely catch up. We wait—they fail."[52] Absent early identification, "children's reading difficulties grow stronger roots, and possibly become more intractable. For the most effective intervention, schools must find

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[52] G. Reid Lyon, *et al.*, *Rethinking Learning Disabilities*, *in Rethinking Special Education for a New Century*, 259, 270 (Chester Finn & Charles Hokanson eds., 2001).

ways to identify these children much earlier than they usually do."[53] Without early identification of students with mathematical disabilities, those students "may not develop a level of mathematics proficiency that is sufficient for success on high-stakes assessment administered in the early grades."[54] The earlier the identification and intervention, the less likely the student is to need intensive special education services as an older child or adolescent.[55] Delaying identification would thus cause irreparable harm to children with learning disabilities.

Indeed, Congress has long acknowledged the importance of early identification of children's disabilities. Provisions for Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services were added to the Medicaid Act in 1967. EPSDT facilitates early detection of health conditions and entitles children to preventative care and treatment. 42 U.S.C. § 1396d(r). When introducing EPSDT, President Lyndon B. Johnson stated, "The problem is to discover, as early as possible, the ills that handicap our children." 90th Cong., 1st Sess. (1967).

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[53] Joseph R. Jenkins, *Early Identification and Intervention for Young Children with Reading/Learning Disabilities*, available at http://www.nrcld.org/resources/ldsummit/jenkins.pdf (2001).

[54] Diane Pedrotty Bryant, *Commentary on Early Identification and Intervention for Students with Mathematics Difficulties*, 38 J. Learning Disabilities 340 (2005).

[55] Lyon, *et al.*, *supra* note 52, at 276.

More importantly, IDEA's Child Find mandate plainly demonstrates Congress's intent to ensure early identification of children with disabilities specifically so they can receive appropriate education from the outset. An interpretation of IDEA that would encourage school districts to do exactly the opposite—by telling them that they do not have to pay for a child's necessary private educational placement even after they fail or refuse to identify the child's special needs—cannot be a correct construction of the law.[56]

VI. As This Case Shows, School Districts May Blame Substance Abuse For Academic Problems To Avoid Acknowledging That Some Students Need Special Education Because Of Learning Disabilities Or Other Health Impairments.

Forest Grove School District's decision to deny that T.A. was eligible for special education services and to refuse to reimburse his parents for private tuition was based in part on his use of marijuana. The district blamed his drug use for

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[56] Petitioner invokes the presumption that public school officials have properly performed their duties under IDEA, in a vain effort to counter the Ninth's Circuit's recognition of the perverse incentive that would be created by petitioner's interpretation of the law. (*See* Brief of Petitioner at 39-40.) But such a presumption cannot categorically preclude determinations in particular cases that school district personnel failed to fulfill their IDEA obligations—especially in light of the critical importance of early identification of, and provision of appropriate educational services to, children with disabilities.

his academic difficulties and for his parents' decision to place him in private school, rather than acknowledging that his drug use might well be the result of his learning problems instead of the cause. Numerous studies confirm that students with learning disabilities and/or AD/HD are more likely to use drugs than students without learning disabilities.[57] In fact, the presence or absence of a learning disability was a better predictor of chemical dependency than gender, ethnicity, age, socioeconomic status, or family composition.[58]

One study found that marijuana use was "significantly higher" among adolescents with learning disabilities.[59] Another study found that children with AD/HD are four times more likely to

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[57] *See, e.g.*, Oscar Bukstein, *Substance Abuse in Patients with Attention-Deficit/Hyperactivity Disorder*, 10 Medscape J. 24 (2008); Brooke S. G. Molina & William E. Pelham, *Substance Use, Substance Abuse, and LD Among Adolescents with a Childhood History of AD/HD*, 34 J. Learning Disabilities 333 (2001); Frances R. Levin & Herbert D. Kieber, *Attention-Deficit Hyperactivity Disorder and Substance Abuse: Relationships and Implications for Treatment*, 2 Harv. Rev. Psychiatry 246 (1995); Jeffrey J. Wilson & Frances Levin, *Attention-Deficit/Hyperactivity Disorder and Early-Onset Substance Abuse Disorders*, 15 J. Child & Adolescent Psychopharmacology 751 (2005); John W. Maag, *et al.*, *Prevalence and Predictors of Substance Use: A Comparison Between Adolescents With and Without Learning Disabilities*, 27 J. Learning Disabilities 223 (1994); Demetra D. Karacostas & Gary L. Fisher, *Chemical Dependency in Students With and Without Learning Disabilities*, 26 J. Learning Disabilities 491 (1993).

[58] *See* Karacostas & Fisher, *supra* note 57.

[59] Maag, *et al.*, *supra* note 57.

develop a substance abuse disorder by adulthood.[60] Children whose AD/HD persists into adulthood have a 50% lifetime risk for developing a substance abuse disorder.[61] Adolescents with AD/HD are also likely to develop a substance abuse disorder at a significantly younger age than those without AD/HD.[62]

Importantly, "[i]n all reported longitudinal studies, the onset of AD/HD *precedes* that of SUD [substance abuse disorder] . . . ."[63] The scientific data supports the theory that students with learning disabilities and/or AD/HD, especially when untreated, are more likely to use drugs due to frustration and low self-esteem resulting from poor academic performance.

Because students with learning disabilities and/or AD/HD are significantly more likely than others to develop substance abuse problems, it is unconscionable to blame substance abuse for the academic problems of a student with a disability, and deny appropriate special education on that basis. School districts cannot avoid their

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[60] Salvatore Mannuzza & Rachel G. Klein, *Long-Term Prognosis in Attention-Deficit/Hyperactivity Disorder*, 9 Child Adolescent Psychiatric Clinics N. Am. 711 (2000).

[61] Bukstein, *supra* note 57.

[62] *See* Timothy E. Wilens, *et al.*, *Attention Deficit Hyperactivity Disorder (AD/HD) Is Associated with Early Onset Substance Use Disorders*, 185 J. Nervous & Mental Disease 475 (1997); Himanshu P. Upadhyaya, *Managing Attention-Deficit/Hyper-activity Disorder in the Presence of Substance Use Disorder*, 68 J. Clin. Psychiatry 23 (2007).

[63] Bukstein, *supra* note 58 (emphasis added).

responsibility to provide special education by misidentifying the problem. IDEA requires that local school districts provide all eligible students with a free, appropriate public education, and it would severely undermine both the express mandates and the fundamental purposes of IDEA to deny special education to those students who have developed secondary problems due to their underlying disabilities.

CONCLUSION

To fulfill Congress's commitment to provide a FAPE for every eligible child with a disability, school districts sometimes must fund private education—including in some cases where children with disabilities have not previously received special education services from their public school districts because the districts failed or refused to recognize and meet their IDEA obligations. The Ninth Circuit properly rejected the argument that school districts never can be required to pay for private education except for children who previously received public special education services. Instead, the Ninth Circuit correctly held that is not the law, and this Court should affirm that decision—for the benefit of children with disabilities, their families, their communities, and our nation as a whole.

Respectfully submitted,

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